Supreme Court, U.S.
FILED
APR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1699

NO.

*

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

*

GARY ELLIOTT, INDIVIDUALLY AND
AS NEXT FRIEND OF
SHAUNA MARIE ELLIOTT, A MINOR,

Appellants,

versus

DR. MARCIAL LEWIN
and
HILLCREST BAPTIST HOSPITAL.,

Appellees.

*

On Appeal from the Supreme Court
of the State of Texas

*

APPENDICES

Benton Musslewhite
Attorney for Appellants
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
Attorney for Appellant

LIST OF APPENDICES

A. Order Texas Supreme Court overruling Appellants Motion for Rehearing.

B. Order Texas Supreme Court refusing writ of error, n.r.e.

C. Judgment of Texas Court of Appeals, affirming district court dismissal.

D. District Court Order overruling Motion for New Trial.

E. Judgment of district court dismissing case with prejudice.

F-1. Notice of Appeal to the Supreme Court of the United States, filed in the Supreme Court of Texas.

F-2. Notice of Appeal to the Supreme Court of the United States, filed 10th Texas Court of Appeals.

F-3. Notice of Appeal to the Supreme Court of the United States, filed 19th District Court of Texas.

G. Interrogatories of Appellee Lewin and Answers thereto.

H. Interrogatories of Appellee Hillcrest and Answers thereto.

I. Appellee Hillcrest's Motion for Sanctions.

J. Letter of counsel for Appellee Hillcrest.

K. Appellee Lewin's Motion for Sanctions.

L. Appellants' response to Motions for Sanctions.

M. Supplemental answer to Interrogatory No. 22.

N. Appellants' Motion for New Trial, with attachments.

O. Excerpts of Appellee Hillcrest's brief before the Texas Court of Appeals.

Q. Rule 215, T.R.C.P. relevant portions.

R. Appellate rules, T.R.C.P., relevant portions.

APPENDIX A

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 6, 1988.

RE: Case No. C-6889

STYLE: GARY ELLIOTT, INDIVIDUALLY AND a/n/f OF SHAUNA MARIE ELLIOTT V. DR. MARCIAL LEWIN ET AL.

ORDER

Petitioner's Motion for Rehearing of Application for Writ of Error having been duly considered it is ordered that said motion be and hereby is overruled. (Chief Justice Phillips not sitting).

APPENDIX B

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

November 18, 1987

Mr. Benton Musslewhite
609 Fannin
Suite 517
Houston TX 77002

Mr. Roy L. Barrett
Naman, Howell, Smith & Lee
Texas Center
P. O. Box 1470
Waco TX 76703

Ms. Susan Kelley-Claybrook
Haley, Davis, Wren, Bristow & Rasner
United Bank Plaza, Suite #300
510 North Valley Mills Drive
Waco TX 76710

RE: Case No. C-6889

STYLE: GARY ELLIOTT, INDIVIDUALLY AND a/n/f OF SHAUNA MARIE ELLIOTT v. DR. MARCIAL LEWIN ET AL.

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By s / Mary M. Wakefield
Deputy

APPENDIX C

AFFIRMED
AUGUST 13, 1987

NO. 10-86-176-CV

Trial Court
85-0701-1

IN THE
COURT OF APPEALS
FOR THE
TENTH DISTRICT OF TEXAS
AT WACO

*

GARY ELLIOTT, INDIVIDUALLY AND
AS NEXT FRIEND OF SHAUNA MARIE
ELLIOTT, A MINOR CHILD,

Appellant

v.

DR. MARCIAL LEWIN, ET AL,

Appellees

*

From 19th Judicial District Court
McLennan County, Texas

*

O P I N I O N

*

The court sanctioned the plaintiffs in this medical malpractice case by dismissing their suit with prejudice for

an abuse of discovery. The question is whether the court abused its discretion in doing so. The judgment is affirmed because, without a statement of facts or findings of fact and conclusions of law, the court is conclusively presumed to have correctly exercised its discretion.

A court's decision to impose sanctions under Rule 215 is subject to review for an abuse of discretion. **Bodnow Corp. v. City of Hondo**, 721 S.W. 2d 839, 840 (Tex. 1986); Tex. R. Civ. P. 215. The question is whether the court acted without reference to any guiding rules and principles. **Downer v. Aquamarine Operators, Inc.**, 701 S.W.2d 238, 241-42 (Tex. 1985). Stated differently, the question is whether the court acted arbitrarily or unreasonably. **Id.** at 242. An appellate court cannot substitute its judgment for that of the trial court in reviewing a sanction order. **See id.** Furthermore, abuse of discretion cannot be

c termined without a statement of facts of the sanction hearing. **See Vestal v. Jackson**, 598 S.W.2d 724, 726 (Tex. Civ. App.--Waco 1980, no writ). This is because the appellate court must presume, without a statement of facts, that the evidence supported the judgment. **See Englander Co., Inc. v. Kennedy**, 428 S.W. 2d 806 (Tex. 1968).

Plaintiffs-appellants argue under their first point that the court erred when it failed to find that the answers to three interrogatories were deficient or to specify how the answers were deficient. This complaint is rejected because, without findings of fact or conclusions of law in the appellate record, all findings necessary to support the judgment are implied on appeal. **See Burnett v. Motyka**, 610 S.W. 2d 735, 736 (Tex. 1980). They also complain that the court imposed the most drastic sanction available to it without ever having entered an order

compelling discovery. Rule 215 expressly authorizes the court to sanction a litigant although no order has ever been entered to compel discovery. **See** Tex. R. Civ. P. 215, 1. b; **see also** Kilgarlin & Jackson, **Sanctions for Discovery Abuse Under New Rule 215**, 15 St. Mary's L.J. 767, 776 (1984). Plaintiffs-appellants also argue several evidentiary matters that cannot be determined without a complete statement of facts. These include contentions that the evidence showed: (1) they had "good cause" for answering the interrogatories the way they did; (2) they had made a "good faith effort" to answer the three interrogatories; (3) they had a "reasonable explanation" why the three interrogatories could not be more completely answered; (4) they had not acted willfully, in bad faith or with gross negligence; and (5) defendants had

failed to show harm. Without a complete statement of facts, this court must presume that the evidence was sufficient to support the judgment. **See Englander Co., Inc.**, 428 S.W.2d at 806-07. Point one is overruled.

The second point is that the court acted unconstitutionally when it imposed sanctions. Rule 215, which provides for notice and a sanction hearing, guarantees the essence of due process. **See** Tex. R. Civ. P. 215, 1., d. Additionally, the holding in **Ins. Corp. of Ireland v. Compagnie des Bauxites**, 456 U.S. 694 , 102 S. Ct. 2099, 2107, 72 L. Ed. 2d 492 (1982), requires the sanction decree to be just and be specifically related to the harm done by the condemned conduct in order to pass muster under due process. **See** 15 St. Mary's L. J. at 795-96. This means that in the circumstances of the particular case the trial court did not abuse its discretion and that the sanction

was tailored to redress the prejudice to the other party. **See id.**

The record reflects that plaintiffs-appellants were given notice of and participated through counsel in the sanction hearing. Without a statement of facts or findings of fact and conclusions of law, this court must presume that, under the circumstances, the trial court did not abuse its discretion and that it tailored the sanction to redress the prejudice to defendants. **See Englander Co., Inc.**, 428 S.W.2d at 806-07. Point two is overruled.

Affirmed.

BOB L. THOMAS
Justice

DO NOT PUBLISH

APPENDIX D

DISTRICT COURT FEE SYSTEM
CIVIL DOCKET SHEET

DATE: 02/18/88
TIME: 15:00:56

COURT NO: 1
CAUSE NO: 85-0701-1
ACTION NO: 01
FILE DATE: 02/15/85

ELLIOTT VS DR LEWIN & H B M C

PARTIES TO CASE

01 ELLIOTT, GARY
02 LEWIN, DR MARCIAL ET AL
03 HILLCREST BAPTIST MED CENTER

ATTORNEY

P 03 MUSSLEWHITE, BENTON
D 02 WREN, JAMES E
D 01 BARRETT, ROY

DATE	PARTY		COURT PROCEEDINGS
8/28/86	01	A	ORDER OVERRULING MOTION FOR NEW TRIAL

APPENDIX E

NO. 85-0701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR	]	IN THE DISTRICT COURT
	]	OF
V.	]	
	]	McLENNAN COUNTY, TEXAS
DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER	]	
	]	19TH JUDICIAL DISTRICT

JUDGMENT

ON THE 13TH DAY OF JUNE, 1986, in the above numbered and entitled cause, wherein Gary Elliott, individually and as next friend of Shauna Marie Elliott, a minor, are plaintiffs and Dr. Marcial Lewin and Hillcrest Baptist Medical Center are defendants, came on to be heard the Motions for Sanctions under Rule 215, Texas Rules of Civil Procedure, of both said defendants against plaintiffs, and came plaintiffs by and through two attorneys who represented to the Court that they were authorized and requested by

counsel of record for plaintiffs to appear on behalf of plaintiffs at said hearing, and came defendants by and through their counsel of record herein, and announced ready for hearing on the Motions for Sanctions by said defendants.

The Court, having heard the evidence and considered the pleadings, affidavit, motions for sanctions filed by both defendants, and proper notice from both defendants of said hearing, and further finds that plaintiffs have abused the discovery process, as set forth in the Texas Rules of Civil Procedure, by resisting proper discovery directed to plaintiffs herein as fully established by the record before the Court at said hearing, and the Court further finds that it should impose the sanction authorized by Rule 215 and strike all pleadings of plaintiffs herein, dismiss all plaintiffs' claims and causes of action herein with

prejudice and render judgment that plaintiffs take nothing from defendants herein.

It is, therefore, ORDERED, ADJUDGED and DECREED that the pleadings of plaintiffs herein against both both defendants are in all things stricken.

It is, further, ORDERED, ADJUDGED and DECREED that all claims and causes of action of plaintiffs, Gary Elliott, individually and as next friend of Shauna Marie Elliott, a minor, against defendants, Dr. Marcial Lewin and Hillcrest Baptist Medical Center, are hereby in all things dismissed with prejudice and it is the judgment of the Court that plaintiffs take and recover nothing herein against defendants.

It is, further, ORDERED, ADjUDGED and DECREED that all costs of court incurred herein are taxed against plaintiffs for which execution shall issue.

SIGNED this 16th day of June, 1986.

DISTRICT JUDGE

APPENDIX F-1

IN THE SUPREME COURT
OF THE STATE OF TEXAS

*

NO. C-6889

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR

*

[Filed March 30, 1988]

*

NOTICE OF APPEAL

Petitioners Gary Elliott, Individually and As Next Friend of Shauna Marie Elliott, A Minor, hereby give notice of their appeal to the United States Supreme Court of the decision of the Supreme Court of Texas in the above-captioned case, entered on November 18, 1987, denying application for Writ of Error, No Reversible Error, and on January 6, 198i, denying Petition for Rehearing. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Sect 1257 (2).

Respectfully submitted,

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA # 14752000

Attorney for Appellants

Date: March 29, 1988.

APPENDIX F-2

IN THE COURT OF APPEALS
FOR THE TENTH
SUPREME JUDICIAL DISTRICT
OF TEXAS AT WACO

*

NO. 10-86-176-CV

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR

VS.

DR. MARCIAL LEWIN, ET. AL.

*

[Filed March 30, 1988]

*

NOTICE OF APPEAL

Petitioners GARY ELLIOTT, Individually and As Next Friend of SHAUNA MARIE ELLIOTT, A Minor, hereby give notice of their appeal to the United States Supreme Court of the decision of the Court of Appeals of Texas, affirming the dismissal by the Stae District Court entered on August 13, 1987. The jurisdiction of the Supreme Court of the United States is

invoked pursuant to 28 U.S.C. Sect. 1257 (2).

Respectfully submitted,

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA # 14752000

Attorney for Appellants

Date: March 29, 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 29th day of March, 1988.

BENTON MUSSLEWHITE

APPENDIX F-3

IN THE DISTRICT COURT
OF McLENNAN COUNTY, TEXAS
19TH JUDICIAL DISTRICT

*

NO. 85-0701-1

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOTT, A MINOR
VS.
DR. MARCIAL LEWIN, ET. AL.

*

[Filed March 30, 1988]

*

NOTICE OF APPEAL

Petitioners GARY ELLIOTT, Individually and As Next Friend of SHAUNA MARIE ELLIOTT, A Minor, hereby give notice of their appeal to the United States Supreme Court of the decision of the Texas District Court in the above-captioned case, entered on June 13, 1986, entering judgment of dismissal with prejudice and on August 28, 1986, overruling the Plaintiffs' Motion for New Trial. The jurisdiction of the Supreme Court of the

United States is invoked pursuant to 28 U.S.C. Sect. 1257 (2).

Respectfully submitted,

BENTON MUSSLEWHITE
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA# 14752000

Attorney for Appellants

Date: March 29, 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 29th day of March, 1988.

BENTON MUSSLEWHITE

APPENDIX G

NO. 85-701-1

GARY ELLIOTT, AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D.	]	19TH JUDICIAL DISTRICT

FIRST SET OF WRITTEN INTERROGATORIES TO GARY ELLIOTT

Pursuant to the provisions of Rule 168, Texas rules of Civil Procedure, the following interrogatories are submitted by Defendant Marcial Lewin, M.D., to Plaintiff and Plaintiff's attorney of record to be answered fully and under oath within thirty-one (31) days after service of these Interrogatories in accordance with said Rules, which period shall be deemed continuing so as to require supplemental answers if Plaintiff or Plaintiff's attorney obtains further information between the time Answers are served and the time of hearing on this

matter. The Interrogatories and the sworn Answers thereto may be offered in evidence by Defendant at the hearing on the above styled and numbered cause. In accordance with Rule 168, you are requested to answer the Interrogatories as follows:

1. Please state your full name, date and place of birth, and Social Security number.

ANSWER: Gary Michael Elliott. Born August 31, 1954, Denver, Colorado. Social Security Number 521-86-1789

2. Please state your present residence address and all previous residence addresses at which you have lived in the past five (5) years and the dates and length of residence at each location.

ANSWER: Present address is: Texas Department of Corrections, Beto Unit II, Route 2, Box 250, Palestine, Texas 75801, From February 1984 to present. Wynne Farm Unit-Huntsville, TX 77340, from November 1982 to August 1983. Eastham Unit-Lovelady, TX. From April 1981 to (over)

3. Please state where and when you have attended school and the educiational grade or degrees you have attained.

ANSWER: Rose Hill Elementary, Kearney Jr. High School, Commence City, Colorado.

El Reno High, El Reno Okla. 11th Grade - GED San Angelo, TX, High School Diploma from Windham Education School Systems.

4. If you are married or have ever been married, please state:

(a) The full name of your spouse and/r any former spouse and the date of each such marriage.

ANSWER: Nona Elliott, March 1984 to present. Phyllis Elliott 1980 to 1981. Phyllis Elliott was in a car wreck in October 1981 and died at Hillcrest Hospital, Waco, TX.

(b) Whether any such marriage has been terminated by death or divorce, including when and where.

ANSWER: The marriage to Phyllis Elliott was terminated by death.

5. Please state the name, age and present address of each of your children.

ANSWER: Shauna Elliott
206 W. 18th Street
San Angelo, TX 76902
Nine (9) years old.

6. Please state your occupation or profession.

ANSWER: Concrete Finisher and Horse Shoer.

7. If you are self-employed, please state:

(a) The name, all trade names, and the address or addresses of your business.

ANSWER: Employed by Western Geophysical during 1980 and 1981. Incarcerated in the Texas Department of Corrections, from 1983 to 1984, and as of now.

(b) How long you have been so engaged, full or part-time.

ANSWER: Presently incarcerated in the Texas Department of Corrections.

(c) Your net income from your business for each of the preceding five (5) years, and your estimated net income for this year.

ANSWER: Unknown.

8. If you are employed, other than as self-employed, please state as to each employment:

(a) The name and address of your employer and your business address if different form your employer's.

ANSWER: Incarcerated Defendant

(b) The hours and days of your duties and employment and your present rate of compensation.

ANSWER: Incarcerated Defendant

(c) The length of your employment with this employer.

ANSWER: Incarcerated Defendant.

9. If your answers to Interrogatory No. 7 and No. 8 do not fully cover your employment for the past five (5) years, please furnish the same information as to

each other employment for the preceding five (5) (years, including th annual income and reason for termination of each such job.

ANSWER: Same as No. 8.

10. Please state the source and the amount of any income which you receive other than that specificed in the answers to Interrogatory No. 7, No. 8 and No. 9 above.

ANSWER: I receive a monthly Oil Royalties check which varies in amount.

11. If you have ever been charged with or convicted of a felony, or charged with or convicted of a criminal offense involving moral turpitude, please state the nature, place, aproximate date, and disposition of each such charge.

ANSWER: Possession of marijuana (1975). Delivery of marijuana (1977). Delivery of marijuana (1984). All out of San Angelo, Tom Green County.

12. Please state the name, address, and specialization of each person you expect to call as an expert witness at the trial of this case.

ANSWER: Experts have not been selected at this time. When we have decided the experts we will use, a list will be provided for you.

13. With regard to each expert named in your answer to Interrogatory No. 12, please state the type and date of each investigation or examination by the expert of matters related to this lawsuit.

ANSWER: Experts have not been selected at this time.

14. With regard to each expert named in your answer to Interrogatory No. 12, please state whether you, your agents or attorneys have received any oral or written reports of the expert, and if so, whether each such report was oral or written.

ANSWER: Same as No. 12.

15. With regard to each expert named in your answer to Interrogatory No. 12, has such expert rendered any opinion or opinions, either oral or written, concerning this lawsuit, and if so, please state each such opinion.

ANSWER: See Answer No. 12.

16. Please state the name and address of each expert with whom you or your attorneys have consulted regarding this case and who you do not now positively aver will not be called to testify at the trial of this case.

ANSWER: See Answer No. 12.

17. Please state the names and addresses of all persons, including but not limited to experts, having knowledge of facts relevant to this lawsuit, as required by Rule 166(b) of the Texas Rules of Civil Procedure.

ANSWER: Sherry Hightower
Mountain View Unit
Route 4, Box 800
Gatesville, Texas 76528

18. Please list those sections, portions or pages of each and every book, treatise, periodical or other documet which will or may be established as a reliable authority by any expert witness to be called by you or your attorney at the trial of this cause.

ANSWER:

19. Please list each written document or tangible object which will or may be tendered into evidence by you or your attorney in the trial of this cause.

ANSWER:

20. Please state the names and addresses of all physicians, including medical doctors, osteopaths, chiropractors or any other person practicin the healing arts, who have examined, treated, or prescribed for Phyllis Elliott at the same time as or at any time subsequent to the treatment by Marcial Lewin, M.D., complained of in this lawsuit, and the dates or approximate dates that such physicians examined, treated, or prescribed for Phyllis Elliott.

ANSWER: Marcial Lewin M.D. is thonly physician that I have knowledge of that examined Phyllis Elliott.

21. Please state the name and addresses of all physicians, including medical doctors, osteopaths, chiropractors

or any other persons practicing the healing arts, who have examined, treated, or prescribed for Phyllis Elliott for any complaint or condition related in any way to the condition made the basis of this lawsuit, whether such treatment or consultation was before, at the same time as, or subsequent to the treatment by marcial Lewin, M.D., complained of in this lawsuit, and please state the dates or approximate dates that such physicians examined, treated, or prescribed for Phyllis Elliott.

ANSWER: Childbirth - I don't know name of hospital

Car accident - Hillcrest Baptist Memorial Medical Center

22. Please state the name and address of each hospital where Phyllis Elliott have ever been admitted as a patient, and the reason and approximate date for each.

ANSWER: Childbirth - I don't know name of hospital

Car accident - Hillcrest Baptist Memorial Medical Center

23. If you are making a claim for payment of medical expenses, please attach a copy of each bill upon which your claim for medical expenses is based, or please list each medical expense for which claim is being made, including the amount, the type of treatment it was for, and to whom each such medical expense was incurred.

ANSWER: I am claiming medical expenses in relationship to Phyllis Elliott's treatment from the car wreck. I don't know

the exact dollar amount but will sign a release so that you can procure the bill from the hospital.

24. With regard to the allegation made by you in the petition filed by your attorney that Dr. Lewin was negligent in the treatment of Phyllis Elliott, please state the specific facts, if any, which you and your attorney are relying upon in good faith to substantiate your claim of negligence.

ANSWER: Because of the negligent acts or omissions of the staff my wife's untimely death was caused.

25. Please state the full name of each parent of Phyllis Elliott, whether natural or adopted, and please indicate whether each such parent is living or deceased.

ANSWER: Billy Coppedge; Mattie Bolden
Living - Billy - 206 W. 18th Street, San Angelo, TX 76902
Living - Mattie - Box 293 Gail, TX 79738

26. Please state the full name and date of birth of each and every child born to or adopted by Phyllis Elliott, and please indicate whether each such child is living or deceased.

ANSWER: Shauna Elliott, born February 22, 1976.

27. Please state the present residence address of Shauna Elliott and the full name of the parent or guardian having custody of the child.

ANSWER: 206 W. 18th Street, San Angelo, Texas
Billy Coppedge is her Guardian.

Respectfully submitted,

HALEY & DAVIS, P.C.

By:
James E. Wren
Attorney for Defendant(s)
United Bank Plaza
Suite 310
510 N. Valley Mills Drive
Waco, Texas 76710
(817) 776-3336
Bar Card No. 22018200

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorney of record for each party in the above case in accordance with the Rules of Civil Procedure on this day of May, 1986.

James E. Wren

THE STATE OF]

COUNTY OF]

BEFORE ME, the undersigned authority, on this day personally appeared Gary Elliott, known to me to be the person whose name is subscribed to the foregoing answers to interrogatories and after having been duly sworn stated on [s]he oath that [s]he is the Plaintiff in the above captioned case, that [s]he has read the foregoing answers to interrogatories and that they are true and correct.

/s/
Gary Elliot

SWORN TO AND SUBSCRIBED before me by the said on this the 7th day of June, 1985.

s/ David M. Brogh
Notary Public in and for
Anderson County Texas

My commission expires
10-28-87

APPENDIX H

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT
VS.	]	OF
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	McLENNAN COUNTY, TEXAS
	]	19TH JUDICIAL DISTRICT

INTERROGATORIES

TO: GARY ELLIOTT, BY AND THROUGH HIS ATTORNEY OF RECORD, MR BENTON MUSSLEWHITE, 609 FANNIN, SUITE 517, HOUSTON, TEXAS 77002.

The attached interrogatories are submitted to you under the terms and provisions of Rule 168, Texas Rules of Civil Procedure, and under the terms of that Rule you are required to answer the interrogatories separately and fully, in writing, and under oath. Your signed answers must be filed and a copy delivered to Roy L. Barrett, P. O. Box 1470, Waco, Texas 76703, within thirty-one (31) days

after the date of service hereof.

NAMAN, HOWELL, SMITH & LEE, P.C.
Texas Center
P. O. Box 1470
Waco, Texas 76703
817/754-1421

BY:
Roy L. Barrett
State Bar No. 01814000

Attorneys for Defendant Hillcrest Baptist Medical Center

CERTIFICATE

A true copy of this notice and attached interrogatories has been mailed by certified mail, return receipt requested, to the above addressed attorney this 28th day of May, 1985.

Roy L. Barrett

INTERROGATORIES TO GARY ELLIOTT

For the purpose of these interrogatories, the following definitions shall aply to the terms used herein:

"Identity" or "Identify" as used in these interrogatories in reference to an individual person means to state his or

her full name and present address, and his or her present or last known employment or business affiliation.

"Occurrence in question" as used in these interrogatories means the accident or occurrence or event made the basis of this suit.

"Deceased" as used herein refers to Phyliss Elliott.

1. State your name, address, date of birth, social security number, and driver's license number.

Gary Michael Elliott #379953
Rt 2 Box 250
Palestine, Texas 75801
DB: 8-31-54
SS# 521-86-1789

2. If you are married, state the name and address of your spouse, the date of your marriage to your spouse, and the county in which such marriage occurred.

I am not married.

3. If you have ever been married previously, other than to your present spouse, please state to whom you were previously married, when and where you were previously married, and how the previous marriage or marriages ended, and when.

Phillis Elliott
Date of marriage 1980. Marriage took place at Culberson county, Van Horn. Marriage ended when Phyllis was killed in a car accident on 9-29-81.

4. If you are currently employed, state the name and address of your employer, the length of time you have been employed by such employer, your job position or duties and your wages or salary rate.

I am presently not employed.

5. For each child that you have or have had, state as follows:

(a) The name of each such dhild.

Shanna Elliott

(b) Date of birth or each such child.

February 22, 1976.

(c) Whether such child is living or deceased, and if any such child is deceased, the date of death of such child.

Living.

(d) Address of each child and marital status of each child.

206 W. 18th
San Angelo, Texas 76902

6. State the name and current address of each surviving parent of the deceased and, if either parent is deceased, state the name and date of death of each deceased parent of the deceased.

Billy Coppedge - 206 W. 18th. San

Angelo, Texas 76901

Mattie Bolden - Box 293, Gail, Texas 79738

7. State the name, age, and address of each grandchild that you have, and the name and address of each parent of each such grandchild.

None.

8. Please state the full name, last address, date of birth, social security number, and driver's license number of the deceased.

Phyliss Elliott
612 West 44th
San Angelo 76903
DOB: 4/15/58

9. State the names and addresses of all doctors, of every kind and character, who examined or treated or prescribed for the deceased during the ten years prior to the death of the deceased.

I am in the process of obtaining this information and will provide you with this information as soon as I receive it.

10. State the name and addresses of each and every hospital where the deceased was ever admitted for treatment as a patient and the approximate date thereof.

Phyliss was admitted to the hospital for child burth and this is the only time that I know.

11. State the names and addresses of each and every person who has knowledge of any facts regarding the occurrence in question, the death of the deceased, or the damages alleged in this suit.

Mattie Bolden - Box 293, Gail, Texas 79738

Billy Coppedge - 206 W. 18th, San Angelo, Texas 76901

Carol Coppedge - 206 W. 18th San Angelo, Texas 76901

12. If you, your attorney, or anyone else in your behalf, has consulted with any person holding himself out to be an expert or consultant in any field with respect to any of the issues in this case, and including any person employed by your attorney to assist him in the preparation of this case, please identify each such person by name, address, and telephone number.

None.

13. State the name and address of each expert who you do not positively aver will not be called to testify at the trial at this case and with whom you or your attorneys have consulted regarding the occurrence in question, or the cause or causes thereof, or the condition of any of the instrumentalities involved in the occurrence in question, or the condition of the scene or area where the occurrence in question occurred.

Experts have not been selected at this time. When we have decided the experts in

which we will use a list will be provided for you.

14. With respect to each expert named in your answer to the preceding interrogatory, state the area of each expert's filed of expertise and the opinions which each such expert has expressed.

As soon as experts have been selected a list will be provided to you.

15. State the name and address of each expert witness whom you or your attorney expect to call to testify at the trial of this case, and include in your response each such expert's area of expertise, the subject matter to which each such expert's testimony will relate, and the opinions to which each such expert is expected to testify.

This information will be provided to you as soon as we select our experts.

16. With respect to each expert named in your answer to the preceding interrogatory, identify by date and subject matter any reports, including factual observations and opnions, whether written or oral, prepared by each such expert witness. Please attach as exhibits any written reports, including factual observations and opinions, to your answers to these interrogatories, or state the reason or reasons why you refuse to do so.

None at this time.

17. If any photographs, videotapes, motion pictures, or any other photographic

representations have been made or taken by you or your agents or attorneys or representatives of the scene of the occurrence in question or of any of the instrumentalities, persons, or parties, involved in the occurrence in question, state as follows:

(a) The type of photographic representation made or taken, i.e. whether a motion picture, videotape, or still photographs.

None.

(b) Describe the subject matter of such photographic representation or representations.

None.

(c) Identify the person having custody, possession or control of such photographic representations.

None.

18. When and where did you last see the deceased prior to the occurrence in question?

I visited with her at the Hillcrest Hospital shortly before she died.

19. If the deceased was ever married to a person other than you, state the date of each such other marriage, the current name and address of the souse of each such other marriage, the county in which each such other mariage occurred, and how each such other marriage ended and when.

She was not married before.

20. If the deceased ever had any children, either born or adopted, state the name and current address of each such child, the date of birth of each such child, the name and address of the other parent of each such child, and whether such child is living or deceased, and if deceased, the date of death.

One child: Shanna Elliott, 2/22/76
Child is living

21. If the deceased was employed at the time of the occurrence made the basis of this suit, state the name and address of the deceased's emplyer, the period of time that the deceased had been so employed, and the deceased's wage or salary rate from such employer.

Unemployed.

22. State the specific facts which form the basis of your allegations of negligence on the part of defendant, Hillcrest Baptist Medical Center.

Because of the negligent acts or omissions of the staff, our plaintiff's untimely death was caused.

23. State whether or not the deceased had ever been, prior to the death of the deceased, convicted of or pleaded guilty to any felony or any misdemeanor criminal offense? If so, state the nature of each offense, the date of each conviction or plea, and the county in which each such conviction or guilty plea occurred.

None.

AFFIDAVIT

THE STATE OF TEXAS]
]
COUNTY OF ANDERSON]

BEFORE ME, the undersigned authority, on this dayh personally appeared GARY ELLIOTT, known to me to be ther perosn whose name is subscribed to the foregoing Answers to Interrogatories and after having duly sworn stated on his oath that he is the Plaintiff in the above captioned case, that he has read the foregoing answers to interrogatories and that they are true and correct.

GARY ELLIOTT

SWORN TO AND SUBSCRIBED before me by the said GARY ELLIOTT on this the 8 day of

October 1985.

s/Douglas Lowry

Notary Public in and for

Anderson County, Texas

My commission expires: 10/28/87

APPENDIX I

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT
	]	OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D.	]	119TH JUDICIAL DISTRICT

DEFENDANT HILLCREST BAPTIST MEDICAL CENTER'S RULE 215 MOTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES defendant Hillcrest Baptist Medical Center, and makes and files this its Motion under Rule 215 andin support thereof would respectfully show the Court as follows:

1.

On May 28, 1985, defendant Hillcrest Baptist Medical Center filed its interrogatories to Gary Elliott, plaintiff, and

served same on counsel for plaintiff. Receipt of service of said interrogatories was acknowledged by plaintiff by way of return certified mail receipt dated June 3, 1985, a true and correct copy of which is attached hereto as Exhibit "A" and fully incorporated herein.

2.

On July 22, 1985, plaintiff's office contacted defendant's office and requested an additional copy of the interrogatories. In response to the plaintiff's request, defendant Hillcrest Baptist Medical Center's attorney forwarded to plaintiff another copy of the interrogatories on July 24, 1985, which is evidenced by Exhibit "B" which is attached hereto and incorporated fully herein.

3.

The originals of said interrogatories are on file in the Clerk's office among the papers in this cause together with the

requisite certificates of service. The plaintiff was required to serve his written answers to these interrogatories on or before July 5, 1985, a date more than 30 days following their service upon him. Gary Elliott has failed to serve answers to said interrogatories.

4.

As of the filing of this Motion, plaintiff has filed no response to defendant's interrogatories.

5.

In light of plaintiff's unjustified failure to respond to discovery and the flagrant abuse of the discovery process, defendant moves the Court to dismiss plaintiff's suit against defendant pursuant to the provisions of Rule 215-2b(5) of the Texas Rules of Civil Procedure.

6.

In the alternative, defendant moves the

Court to enter an order prohibiting plaintiff from introducing any evidence on the issues inquired into in the interrogatories propounded to him.

7.

The defendant further moves the Court that an order be entered refusing to allow plaintiff to support the claims or to introduce any evidence pertaining to the matters set out in Plaintiff's Original Petition or any amended petitions or supplementary petitions filed herein.

8.

Defendant alternatively moves the Court to order the plaintiff to answer the interrogatories on or before November 5, 1985 or on or before such date as ordered by the Court.

9.

In connection with this Motion, defendant moves the Court to grant defendant's costs and reasonable

attorney's fees in bringing this Motion, which were necessitated by plaintiff's abuse of the discovery process.

10.

Defendant further moves the Court for any further relief authorized by Rule 215 to which it may show itself justly entitled.

WHEREFORE, PREMISES CONSIDERED, defendant moves the Court to enter an order pursuant to the foregoing Motion and for further relief to which defendant is entitled. Defendant further prays for reasonable attorney's fees and costs of Court.

NAMAN, HOWELL, SMITH & LEE, P. C.

Texas Center
P. O. Box 1470
Waco, Texas 76703
817/754-1421

By:
Roy L. Barrett
State Bar No. 01814000

Attorneys for Defendant,
Hillcrest Baptist Medical
Center

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion Under Rule 215 has been mailed to opposing counsel this 27th day of September, 1985.

Roy L. Barrett

NOTICE OF HEARING

This is to notify you that the above Motion Under Rule 215 has been set for hearing on November 1, 1985, at 2:00 p.m. in the 19th District Courtroom in McLennan County, Texas.

Roy L. Barrett

APPENDIX J

NAMAN, HOWELL, SMITH & LEE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
TEXAS CENTER
NINTH AND WASHINGTON
P.O.BOX 1470
WACO, TEXAS 76703
(817) 754-1421

November 1, 1985

CERTIFIED MAIL NO. 562 512
RETURN RECEIPT REQUESTED

Mr. Benton Musslewhite
Attorbney at Law
609 Fannin
Suite 517
Houston, Texas 77002

Re: Cause No. 85-0701-1
Elliott v. Dr. Marcial Lewin and
Hillcrest Baptist Medical Center

Dear Mr. Musslewhite:

Due to the confusion regarding the status of the November 1, 1985, hearing, and your unavailability because of the death in your family, the Court has, at our request, cancelled the November 1, 1985, hearing on our Rule 215 Motion in the above matter and reset a hearing on the Motion for November 22, 1985, at 3:00 p.m.

We received on October 31, 1985, Answers to Interrogatories by Gary Elliott. Answers to Interrogatories numbered 9, 10 and 22 are incomplete and

insufficient.

Kindest regards.

Yours very truly,

NAMAN, HOWELL, SMITH & LEE

BY:
Roy L. Barrett

RLB:ca
cc: Judge Bill Logue
cc: Mr. James Wren
Attorney at Law

APPENDIX K

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	19TH JUDICIAL DISTRICT

DEFENDANT DR. MARCIAL LEWIN'S RULE 215 MOTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Dr. Marcial Lewin, one of the Defendants in the above entitled and numbered cause and makes and files this Motion under Rule 215 of the Texas Rules of Civil Procedure and in support thereof respectfully shows unto the ourt as follows:

I.

On May 21, 1985, Defendant Dr. Marcial Lewin filed Interrogatories directed to Gary Elliott, Plaintiff in this case, and served the Interrogatories upon counsel for the Plaintiff. Receipt of the service of the said Interrogatories was acknowledged by the Plaintiff by way of return receipt for certified mail dated May 24, 1985, a true and correct copy of

the return receipt is attached hereto as Exhibit "A". A true and correct copy of the cover letter which accompanied the Interrogatories to the Plaintiff's attorney is attached to this Motion as Exhibit "B". Both Exhibit "A" and "B" are incorporated into this Motion for all purposes.

II.

The originals of the Interrogatories directed to the Plaintiff are on file in the Clerk's office among the papers in this cause along with the requisite certificate of service. The Plaintiff was required to serve his written answers to these Interrogatories on or before June 25, 1985, a date more than 30 days following their service upon him. The Plaintiff, Gary Elliott, has failed to serve answers to said Interrogatories.

III.

As of the filing of this Motion, the Plaintiff has filed no response to Defendant Dr. Marcial Lewin's Interrogatories.

IV.

Because of the Plaintiff's unjustified failure in responding to discovery, and because of the flagrant abuse of the discovery process, Defendant Dr. Marcial Lewin moves the Court to dismiss the Plaintiff's suit against him pursuant to the provisions of Rule 215-2b(5) of the Texas Rules of Civil Procedure.

V.

In the alternative and without waiving the foregoing, Defendant Dr. Marcial Lewin moves the Court to enter an order prohibiting the Plaintiff from producing any evidence on the issues inquired into in the Interrogatories propounded to the

Plaintiff.

VI.

Defendant Dr. Marcial Lewin further moves the Court that an order be entered refusing the Plaintiff to support the claims or introduce any evidence pertaining to the matter set out in the Plaintiff's Original petition or any amended petitions or supplementary petition filed herein.

VII.

In the alternative and without waiving the foregoing, Defendant Dr. Marcial Lewin moves the Court to order the Plaintiff to answer the Interrogatories propounded to him on or before July 1, 1986.

VIII.

Because of the inaction on the part of Plaintiff, Dr. Marcial Lewin has been caused to bring this Motion. Therefore, Defendant Dr. Marcial Lewin moves the Court to grant his costs and reasonable

attorney's fees in bringing this Motion, which were necessitated by the Plaintiff's abuse of the discovery process.

IX.

Defendant further moves the Court to grant him any relief authorized by Rule 215 of the Texas Rules of Civil Procedure, to which he may show himself entitled.

WHEREFORE, PREMISES CONSIDERED, Defendant moves the Court to enter an Order pursuant to the foregoing Motion and for such further relief which Defendant Dr. Marcial Lewin is entitled. Defendant further prays for reasonable attorneys' fees and costs of court.

Respectfully submitted,

HALEY, DAVIS, WREN,

BRISTOW & RASNER

James E. Wren
Attorney for Defendant
Dr. Marcial Lewin
510 North Valley Mills,

Ste. 300
Waco, Texas 76710
(817) 776-3336
Bar Card No. 22018200

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorney of record for each party in the above case in accordance with the Rules of Civil Procedure on this 22nd day of May, 1986.

James E. Wren

APPENDIX L

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY, AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT
VS.	]	McLENNAN COUNTY,TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	19TH JUDICIAL DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANT HILLCREST BAPTIST MEDICAL CENTER RULE 215 MOTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff, and makes and files response to Defendant, Hillcrest Baptist Medical Center's Rule 215 Motion and would respectfully show the Court as follows:

I.

Plaintiff's attorney as had serious problems because client is in a penal institution and has had no direct contact with relatives and/or in-laws.

II.

It has been difficult to provide the information Defendant has requested because of client's incarceration. We have endeavored to do so and have fully answered all but two (2) of the interrogatories that deal with Decedent's past medical history in the last ten (10) years.

III.

The medical history we have obtained only concerns history of the physician and hospital who attended Decedent during her pregnancy.

IV.

We will be contacting client's in-laws and will provide for release of mecial authorization if Defendant would so wish.

V.

As to prosecution of suit, John Roark, including Jeff McElroy, will be helping us to expedite this case.

VI.

We have now requested Notice of Deposition for Dr. Marcial Lewin on June 25, 1986, following the Depositions, we will provide the name of our expert witness within sixty (60) days and will make expert witness available to you for depositions.

VII.

We will be ready to go to trial after October 1, 1986 at the convenience of the Court. We will require sufficient notice so as to facilitate the issuance of a bench warrant for client.

VIII.

Based upon the foregoing it is clear that Defendant's Motion for drastic sanctions of dismissal and preclusion is inappropriate.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

By: s/ Benton Musslewhite
609 Fannin Suite 517
Houston, Texas 77002
(713) 222-2288

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was mailed to all counsel of record on this the 13th day of June, 1986, by placing same in the U.S. mail, postage pre-paid.

Benton Musslewhite

APPENDIX M

NO. 85-701-1

GARY ELLIOTT, AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	19TH JUDICIAL DISTRICT

SUPPLEMENTAL INTERROGATORIES

TO: HILLCREST BAPTIST MEDICAL CENTER, by and through its attorney of record, Mr. Roy L. Barrett, of NAMAN, HOWELL, SMITH & LEE, P.C., Texas Center, P.O. Box 1470 Waco, Texas 76703.

Pursuant to the Texas Rules of Civil Procedure, the Plaintiffs have answered the Supplementary Answers to Interrogatories filed by the above-referenced Defendants and such answers are contained on the Interrogatories attached hereto and incorporated herein, by reference.

LAW OFFICES OF BENTON
MUSSLEWHITE, INC.
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

BY: s/Benton Musslewhite

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Interrogatories has been mailed to counsel of record by placing same in U.S. Mail, postage pre-paid, on this the 13th day of June, 1986.

s/ Benton Musslewhite

SUPPLEMENTAL INTERROGATORIES NO. 22

We can not give a complete answer to question until we have taken depositions of hospital personnel who attended the Decedent in hospital but, our preliminary investment indicates the following possibilities:

1. Improper treatement given by Dr. and hospital attendants to the burst fracture of C 6.

2. Failure to properly take care of breathing difficulty.

3. Admnistration of wrong drugs or wrong dosage of drugs.

4. Improper application of skull-tongs, including efforts to apply traction.

5. Failure to carry out properly suctioning procedure to eliminate secretions.

6. Given too much codeine.

7. Failure to provide needed psychological care.

8. Failure to properly respond to symptoms of possible cardiac arrest.

9. Failure to use other available means to ensure proper breathing, including possibly a tracheotomy.

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF ANDERSON

BEFORE ME, the undersigned authority, on this day personally appeared GARY ELLIOTT, known to me to be the person whose name is subscribed to the foregoing Answers to Interrogatories and after having duly sworn stated on his oath that

he is the Plaintiff in the above captioned case, that he has read the foregoing answers to interrogatories and that they are true and correct.

GARY ELLIOTT

SWORN TO AND SUBSCRIBED before me the said a GARY ELLIOTT onthis the day of , 1986.

/s/
Notary Public in and for
Harris County, T E X A S

My commission expires:

APPENDIX N

NO. 85-701-1

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA ELLIOTT	]	IN THE DISTRICT COURT OF
VS.	]	McLENNAN COUNTY, TEXAS
HILLCEST BAPTIST MEDICAL CENTER AND MARCIAL LEWIN, M.D	]	19TH JUDICIAL DISTRICT

PLAINTIFFS' MOTION FOR NEW TRIAL WITH RESPECT TO COURT'S ORDER DISMISSING PLAINTIFFS' CASES PURSUANT TO RULE 215

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs in this cause and move the Court for a New Trial, Reconsideration and Reinstatement of this cause of action and for such Motion would respectfully show the Court:

I.

This Court, on June 13, 1986, dismissed this case under the sanctions provided for in Rule 215 T.R.C.P. The Plaintiff would show that the Court erred in dismissing such case, pursuant to such sanctions

rule, for the following good and sufficient reasons:

1. Rule 215, considered together with Rule 166b and the other rules of civil procedure, establish a reasonable cut-off, with respect to Supplementation of Answers to Interrogatories, of no less than thirty (30) days prior to trial of the case on the merits. The only issues in question here are the Answer to Interrogatories 9, 10 and 22. Those supplemental answers were file on June 13, 1986 with the exception of the question of other hospitalizations of the Decedent. The surviving husband, who is now in the penitentiary, does not know the answers to that question and therefore it has been to impossible for Plaintiffs' counsel to obtain the answer to that questions. Where it is impossible for a Plaintiff to answer a question, the failure to answer such question cannot be the subject of a

dismissal under Rule 215 or any other sanctions rule. Thus, all the answers that could be filed by the Plaintiffs which respect to Interrogatories Nos. 9, 10 and 22, were filed on or before June 13, 1986 and such date was far in excess of thirty (30) days in advance of the trial of this case. Wherefore, it was error to utilize the drastic sanctions of dismissal.

2. The Court failed to utilize sanctions consistent with any urported violation. Assuming that Plaintiffs should have answered Nos. 9, 10 and 22 more fully, the failure to do so on the time schedule set by the Defendants did not justify the drastic sanction of dismissal but, at the most, justified a sanction of imposition of attorney fees. The Court erred in failing to temper the sanction to the purported violation involved. As Judge Kilgarlin of the Supreme Court pointed out

in his Article in St. Mary's Law Journal, 15 St. Mary's Law Journal 767, et seq., Rule 215 is to be construed so as to bring about, in accordance with Rule 1, the "just adjudication of substantive rights.". He points out that the main purpose of the sanctions in Rule 215 is "to insure that the abuser does not profit by his wrong and that his adversary does not suffer by it", id. 774, 775 and that the essential purpose of Rule 215 is to prevent either party from being unduly and unfairly surporsed at the trial of the case. Id. @ p. 770. That is the reason that there was written into Rule 166b, as well as into Section 5 of the Rule 215, a thirty (30) day time limit - that is providing all information requested, including answers to interrogatories, supplementation of interrogatories, designation of experts, and the like. The

Defendants have now been provided with all the information we can provide in answer to interrogatories Nos. 9, 10 and 22, and such information was provided far more than thirty (30) days in advance of the trial date.

3. The imposition of the drastic sanction of dismissal in the context of this case constitutes a violation of the Plaintiffs' due process rights, under both the Constitution of the United States and the Texas Constitution. As Judge Kilgarlin, in his St. Mary's Law Journal Article, noted:

> "Even if fair notice and hearing are given, the imposition of sanctions may offend the requisites of due process. The United States Supreme Court in **Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee**, articulated due process requirements that seem applicable to discovery sanction orders in general. **Compagnie des Bauxites**, it is submitted, holds that for a sanction decree to pass constitutional muster it must be just, and be specifically related to the harm done by the condemned conduct. The first standard merely requires that in the

circumstances of the particular case the trial court did not abuse its discretion. The second standard requires that the remedy for the subject discovery abuse be tailored to redress the resultant prejudice to the other party. Examination of the sanctions authorized by Rule 215(2)(b) must be made with these due process concerns in mind." id. at pp. 795-796.

Judge Kilgarlin also noted in connection with the drastic sanction of dismissal:

"These sanctions are termed the 'ultimate' or 'extreme' sanctions. It is settled that, consistent with due process considerations, ultimate sanctions cannot be imposed unless the failure to make discovery is willful, in bad faith or due to some fault of the disobedient party (citing Societe Internationale Pour Participations Industrelles vs. Rogers, 357 U.S. 197, 212 (1958)) ... Other circumstances may call for the harsh sanction of final dismissal (or sanctions tantamount to final dismissal); but, in general, any time a trial court contemplates disposal of a lawsuit on procedural grounds rather thanon the merits it must exercise caution". id. at pages 800 and 802.

Moreover Judge Kilgarlin stated that the Court should consider "eventual compliance with the rule ... in devising an appropriate order (imposition sanctions)".

id. @ p. 804. It is clear that this Court has unduly and unnecessarily, in violation of the due process rights of these Plaintiffs, taken away their right to have their day in court. Even if it be assumed that Plaintiff should have supplemented Answers 9, 10 and 22 in accordance with the schedule set by the Defendants, the most that this Court should have done, in imposing sanctions, is to assess attorneys fees against the Plaintiff and his attorney for the time expended by the Defendant in preparing their Motion for Sanctions and attending the hearing on sanctions.

4. Also, considering the affidavit filed by Plaintiffs' counsel and the fact that the Plaintiff himself - that is, the surviving husband - is in the penitentiary and the minor is not at this time living with him, such situation constitutes "good cause" for the failure to file answers to

Interrogatories Nos. 9, 10 and 22 prior to June 13, 1986. Therefore, the Court erred in imposing the drastic sanctions of dismissal.

5. The Court erred in imposing the drastic sanctions of dismissal because it relied upon an affidavit which was filed the date of the hearing and of which the Plaintiffs and Plaintiffs' lead counsel did not have due notice. The Court should have rejected the filing of said affidavit at the last minute and on the date of said hearing, or continued th hearing to a later date. Particularly is this true since Plaintiffs' lead counsel could not be present due to being in trial in another Court. As the affidavit attached hereto reflects, the counsel who handled the matter, Ms. Susan Ashley, was not familiar enough with the file to be able to resond to such affidavit on the spot.

It was totally unfair and lacking in due process for the Court to grant the filing of said affidavit on the date of the hearing without giving the Plaintiffs' lead counsel a chance to be there in order to respond. Such action of course not only violated the due process rights of the Plaintiffs but constituted an abuse of discretion in going forward on the basis of such an affidavit. Without such affidavit, the record in this cause is clearly insufficient to justify the imposition of the drastic sanction of dismissal.

6. For other good and sufficient reasons, your Plaintiff would show that the Court erred in imposing the drastic sanction of dismissal.

II.

Therefore, Plaintiffs respectfully request the Court to grant a new trial and

reinstate.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS pray the Court to grant such new trial and/or reconsideration and reinstatement of this case upon the Docket.

Respectfully submitted,

LAW OFFICES OF BENTON MUSSLEWHITE, INC.

BY: /s/
Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion For New Trial with Respect to Court's Order Dismissing Plaintiffs' Cases Pursuant to Rule 215 was mailed to all counsel of record, by placing same in U.S. Mail, postage pre-paid on this the 14th day of July, 1986.

/s/
Benton Musslewhite

AFFIDAVIT

STATE OF TEXAS]
]
COUNTY OF HARRIS]

BEFORE me the undersigned authority appeared Susan Ashley, known to me, and after first being sworn did upon her oath, state, swear and affirm as follows:

"My name is Susan Ashley. I make this statement of personal knowledge and of my own free will and accord. I am over twenty-one (21) years of age. I was the attorney that Mr. Musslewhite asked to attend a hearing in Waco, Texas in the case of Elliott et al vs. Dr. Marcial Lewis, et al, Cause No. 85-0701-1 on the Docket of the 19th Judicial District Court of McLennan County, Texas. At such hearing I was presented with an affidavit filed by Roy L. Barrett concernig the alleged procedural history in this case. Not being familiar with this case, and attending the hearing at Mr. Musslewhite's request because he was in trial elsewhere, I simply could not respond to such affidavit.

/s/
Susan Ashley

Plaintiff appeals from the action of the trial court dismissing the case. The record consists of the transcript only. Hillcrest objects to and challenges all references in Appellant's Brief to alleged testimony given at any hearing held in this cause, as unsupported by the record, and does not admit or agree that such alleged testimony was given or is accurately and fairly represented by plaintiff.

* * * *

APPENDIX P

EXCERPTS FROM

NO. 10-86-176-CV

*

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT
WACO, TEXAS

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOT, A MINOR CHILD,

APPELLANT

V.

DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER,

APPELLEES

*

APPELLEE'S BRIEF

Susan Kelley-Claybrook
HALEY, DAVIS, WREN,
BRISTOW & RASNER
United Bank Plaza, Suite 300
510 North Valley Mills Drive
Waco, Texas 76710
(817) 776-3336
Bar Card No. 04334500

ATTORNEY FOR DR. LEWIN,
APPELLEE

STATEMENT OF FACTS

This case was originally file in Houston, Texas, by Gary Elliott, individualy and as next friend of the minor, Shauna Marie Elliott. The suit arose out of medical treatement that the decedent, Phyllis Elliott, received for traumatic injuries sustained in an automobile accident on September 25, 1981. Following the accident, the decedent was transported to Hillcrest Baptist Hospital where she was treated in the emergency room and then placed in intensive care. Her injuries rendered here quadriplegic and she suffered from several related conditions due to the spinal cord injury. Her death occurred early in the morning of September 28, 1981. The plaintiff brought suit against both the hospital and Dr. Marcial Lewin, a treating physician.

After motions were made by both defendants to transfer the case to McLennan County (TR. 8, 20), an agreed Order was entered and signed on march 21, 1984 (TR. 15). The record was received by the McLennan County District Clerk in May of 1985; the filing fee was not paid by the plaintiff until February 18, 1985 (TR. 26). It should also be noted that there was a substitution of local counsel for both Defendants following the transfer of the case to McLennan County (TR. 28, 31).

After filing his answer, Dr. Lewin sent by certified mail a set of written interrogatories to the plaintiff by and through his attorney (TR. 32). The return receipt indicates that the attorney for the plaintiff received said interrogatories on May 24, 1985. (TR. 65). According to the timetable set forth in Rule 168 of the Texas Rules of Civil

Procedure, Plaintiff's Answers to the Interrogatories were due on or about June 23, 1985; no response was received. On May 23, 1986, having waited eleven monts for answers to his discovery attempts, Dr. Lewin filed a Rule 215 Motion seeking sanctions against the plaintiff for his failure to comply with discovery (TR. 65). On June 4, 1986, only 9 days before the hearing date on both Dr. Lewin's and Hillcrest Hospital's Rule 215 Motions, and nearly a year after their due date, Dr. Lewin received answers to the interrogatories he had submitted in May of 1985 (TR. 71). The day of the hearing, Plaintiff sent out notices of his intention to depose Dr. Lewin; said notices were not received by Dr. Lewin until June 19, 1986. On June 13, 1986, the trial court heard both defendants' Rule 215 Motions and dismissed the case with prejudice as a sanction for discovery

abuse committed by the plaintiff against both Dr. Lewin and Hillcrest Hospital (TR. 84).

On July 15, 1986, Plaintiff filed a Motion for New Trial which was overruled by the trial court on August 28, 1986. Notice of Appeal by Gary Elliott and the Appeal Bond were filed with this Court on September 16, 1986 (TR. 95,96). The transcript was received by the clerk of this Court on September 26, 1986; thus, neither the Appeal Bond nor the transcript was filed timely.

Mr. Elliott was granted an extension of time to file the appeal bond and transcripts to the date each was actually received. Plaintiff sought, and was granted, an extension of time to file his brief, thereby changing the due date to November 12, 1986. Mr. Elliott then sought and was granted a further extension to November 19, 1986. A third extension of

time was granted to allow Plaintiff until November 25, 1986 to file his brief. Due to numerous circumstances, Plaintiff requested and was granted an additional one-day extension, and the brief was filed on November 26, 1986. Plaintiff also sought to supplement the record with the transcript of the hearing on his Motion for New Trial, but said Motion was denied by this Court and the transcript is not part of the record on appeal. Additionally, Plaintiff failed to request that the transcript of the Rule 215 Hearing be sent up on appeal and thus that hearing is also not contained in the record before this Court.

with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

* * * * * *

c. *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. *Disposition of Motion to Compel: Award of Expenses.* If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the

APPENDIX Q

Rule 215. Abuse of Discovery; Sanctions

1. **Motion for Sanctions or Order Compelling Discovery.** A party, upon reasonable notice to other parties and all other persons affected thereby, may apply for sanctions or an order compelling discovery as follows:

* * * * * *

b. *Motions.*

* * * * * *

(3) if a party fails:

(a) to serve answers or objections to interrogatories submitted under Rule 168, after proper service of the interrogatories; or

(b) to answer an interrogatory submitted under Rule 168; or ...;

the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance

opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

* * * * * *

2. Failure to Comply With Order or with Discovery Request.

* * * * * *

b. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, ... fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

Plaintiff appeals from the action of the trial court dismissing the case. The record consists of the transcript only. Hillcrest objects to and challenges all references in Appellant's Brief to alleged testimony given at any hearing held in this cause, as unsupported by the record, and does not admit or agree that such alleged testimony was given or is accurately and fairly represented by plaintiff.

* * * *

APPENDIX P

EXCERPTS FROM

NO. 10-86-176-CV

*

IN THE
COURT OF APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT
WACO, TEXAS

*

GARY ELLIOTT, INDIVIDUALLY AND AS NEXT FRIEND OF SHAUNA MARIE ELLIOT, A MINOR CHILD,

APPELLANT

V.

DR. MARCIAL LEWIN AND HILLCREST BAPTIST MEDICAL CENTER,

APPELLEES

*

APPELLEE'S BRIEF

Susan Kelley-Claybrook
HALEY, DAVIS, WREN,
BRISTOW & RASNER
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Waco, Texas 76710
(817) 776-3336
Bar Card No. 04334500

ATTORNEY FOR DR. LEWIN,
APPELLEE

STATEMENT OF FACTS

This case was originally file in Houston, Texas, by Gary Elliott, individualy and as next friend of the minor, Shauna Marie Elliott. The suit arose out of medical treatement that the decedent, Phyllis Elliott, received for traumatic injuries sustained in an automobile accident on September 25, 1981. Following the accident, the decedent was transported to Hillcrest Baptist Hospital where she was treated in the emergency room and then placed in intensive care. Her injuries rendered here quadriplegic and she suffered from several related conditions due to the spinal cord injury. Her death occurred early in the morning of September 28, 1981. The plaintiff brought suit against both the hospital and Dr. Marcial Lewin, a treating physician.

After motions were made by both defendants to transfer the case to McLennan County (TR. 8, 20), an agreed Order was entered and signed on march 21, 1984 (TR. 15). The record was received by the McLennan County District Clerk in May of 1985; the filing fee was not paid by the plaintiff until February 18, 1985 (TR. 26). It should also be noted that there was a substitution of local counsel for both Defendants following the transfer of the case to McLennan County (TR. 28, 31).

After filing his answer, Dr. Lewin sent by certified mail a set of written interrogatories to the plaintiff by and through his attorney (TR. 32). The return receipt indicates that the attorney for the plaintiff received said interrogatories on May 24, 1985. (TR. 65). According to the timetable set forth in Rule 168 of the Texas Rules of Civil

Procedure, Plaintiff's Answers to the Interrogatories were due on or about June 23, 1985; no response was received. On May 23, 1986, having waited eleven monts for answers to his discovery attempts, Dr. Lewin filed a Rule 215 Motion seeking sanctions against the plaintiff for his failure to comply with discovery (TR. 65). On June 4, 1986, only 9 days before the hearing date on both Dr. Lewin's and Hillcrest Hospital's Rule 215 Motions, and nearly a year after their due date, Dr. Lewin received answers to the interrogatories he had submitted in May of 1985 (TR. 71). The day of the hearing, Plaintiff sent out notices of his intention to depose Dr. Lewin; said notices were not received by Dr. Lewin until June 19, 1986. On June 13, 1986, the trial court heard both defendants' Rule 215 Motions and dismissed the case with prejudice as a sanction for discovery

abuse committed by the plaintiff against both Dr. Lewin and Hillcrest Hospital (TR. 84).

On July 15, 1986, Plaintiff filed a Motion for New Trial which was overruled by the trial court on August 28, 1986. Notice of Appeal by Gary Elliott and the Appeal Bond were filed with this Court on September 16, 1986 (TR. 95,96). The transcript was received by the clerk of this Court on September 26, 1986; thus, neither the Appeal Bond nor the transcript was filed timely.

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b. *Motions.*

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(3) if a party fails:

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the discovering party may move for an order compelling a designation, an appearance, an answer or answers, or inspection or production in accordance

with the request, or apply to the court in which the action is pending for the imposition of any sanction authorized by paragraph 2b herein without the necessity of first having obtained a court order compelling such discovery.

* * * * * *

c. *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

d. *Disposition of Motion to Compel: Award of Expenses.* If the motion is granted, the court shall, after opportunity for hearing, require a party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the

opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

* * * * * *

2. Failure to Comply With Order or with Discovery Request.

* * * * * *

b. *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, ... fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under paragraph 1 of this rule or Rule 167a, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) An order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) An order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) *An order striking out pleadings or parts thereof, or staying*

further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default agnst the disobedient party;

(6) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

* * * * * *

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that

other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from he final judgment.

* * * * * *

3. **Abuse of Discovery Process in Seeking, Making, or Resisting Discovery.** If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may impose any sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of paragraph 2b, of this rule. Such order of sanction shall be subject to review on appeal from the final judgment.

* * * * * *

6. Exhibits to Motions and Responses. Motions or responses made under this rule may have exhibits attached including affidavits, discovery pleadings, or any other documents.

Rule 40. Ordinary Appeal-How Perfected.

(a) Appeals in Civil Cases.

(1) *When Security is Required.* When security for costs is required by law, the appeal is perfected when the bond, cash deposit or affidavit in lieu thereof has been filed or made, or if affidavit is contested, when the contest is overruled. ...

Rule 50. Record on Appeal

(a) Contents. The record on appeal shall consist of a transcript and, where necessary to the appeal, a statement of facts. . . ..

Rule 51. The Transcript on Appeal

(a) Contents. Unless otherwise designated by the parties in accordance with Rule 50, the transcript on appeal shall include copies of the following: in civil cases, the live pleadings upon which the trial was held; in criminal

cases, copies of the indictment or information, any special pleas and motions of the defendant which were presented to the court and overruled, and any written waivers; the court's docket sheet; the charge of the court and the verdict of the jury, or the court's findings of fact and conclusions of law; the court's judgment or other order appealed from; any motions for new trial and the order of the court thereon; any notice of appeal; any appeal bond, affidavit in lieu of bond or clerk's certificate of a deposit in lieu of bond; any notice of limitation of appeal in civil cases made pursuant to Rule 40; any formal bills of exception provided for in Rule 52; in civil cases, a certified bill of costs, including the cost of the transcript and the statement of facts (if any), showing any credits for payments made; and, subject to the

provisions of paragraph (b) of this rule, any filed paper any party may designate as material.

* * * * * *

(c) Duty of Clerk. Upon perfection of the appeal, the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant. ....

Rule 53. The Statement of Facts on Appeal

(e) Unnecessary Portions. In civil cases if either party requires more of the testimony or other proceedings than is necessary, he shall be required by the appellate court to pay the costs thereof, regardless of the outcome of the appeal. ....

Rule 54. Time to Fie Record

(a) In Civil Case - Ordinary Timetable. ... Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court ....

Rule 74. Requisites of Briefs

(f) Argument. ... Any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by the opposing party.